

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

CASTLE HILLS FIRST BAPTIST CHURCH,)	
)	
Plaintiff,)	
)	No. SA-01-CA-1149 HG
v.)	
)	
CITY OF CASTLE HILLS,)	
)	
Defendant.)	
)	

**POTENTIAL INTERVENOR UNITED STATES OF AMERICA'S
UNOPPOSED MOTION TO INTERVENE**

INTRODUCTION

Plaintiff Castle Hills First Baptist Church filed suit against the City of Castle Hills on December 14, 2001, challenging the City's denial of special use permits to the Church under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc et seq., the United States Constitution, the Texas Religious Freedom Restoration Act, and the Texas Constitution. Castle Hills submitted a motion for partial summary judgment on August 9, 2002 (filed on December 9, 2002), in which it primarily argued that the City had not imposed a substantial burden on the church by denying the two permits. It also argued that RLUIPA would violate the Establishment Clause if it was applied to protect "non-doctrinal, peripheral matters of secular preference and convenience, such as extra parking." Def.'s Mot. for Partial Summ. J. at 30. Shortly after submitting this motion, Defendant retained new counsel. In Defendant's January 13, 2003, Reply to Plaintiff's Response to the City's motion, the City broadened its challenge to RLUIPA, arguing that the statute was facially invalid because it violated the

separation of powers doctrine and the Establishment Clause, and because it exceeded Congress' enumerated powers. Def.'s Reply Br. at 35-36.

The United States filed an acknowledgment of Defendant's constitutional challenge on January 30, 2003, requesting additional time to secure authorization to intervene from the Solicitor General of the United States.

The United States hereby moves to intervene in this action, pursuant to Fed. R. Civ. P. 24 and 28 U.S.C. § 2403(a), in order to defend the constitutionality of RLUIPA. Counsel for Plaintiff, Defendant, and the State of Texas Intervenor have all indicated that they do not oppose the present motion to intervene.

ARGUMENT

THE UNITED STATES HAS AN UNCONDITIONAL RIGHT TO INTERVENE IN THIS ACTION

Rule 24 of the Federal Rules of Civil Procedure provides for two types of intervention: (1) intervention of right and (2) permissive intervention. With respect to intervention of right, the rule states: "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene. ..." Fed. R. Civ. P. 24(a).

Section 2403(a) of title 28 of the United States Code provides, in pertinent part:

In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court . . . shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. . . .

28 U.S.C. § 2403(a) (emphasis added). This statute confers upon the United States an

unconditional right to intervene when, as in the present case, a party has challenged the constitutionality of a federal statute. See O'Keefe v. New York City Bd. of Elections, 246 F. Supp. 978, 980 (S.D.N.Y. 1965); see also Thatcher v. Tennessee Gas Trans. Co., 180 F.2d 644, 648 n.7 (5th Cir. 1950).

In this case, Defendant asserted as a defense to plaintiff's claim that RLUIPA is unconstitutional – thereby calling into question the constitutionality of an act of Congress. Under these circumstances, 28 U.S.C. § 2403 explicitly confers on the United States an unconditional right to intervene in this action. Accordingly, the United States may intervene as of right under Fed. R. Civ. P. 24(a)(1).

In addition, two other federal statutes, 28 U.S.C. §§ 517 and 518(b), provide the United States with a right to intervene in this action. Section 517 provides:

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

28 U.S.C. § 517. The only explicit limitation upon that section is "that the interests of the United States be at stake." Brawer v. Horowitz, 535 F.2d 830, 834-35 (3rd Cir. 1976). Similarly, § 518(b) provides:

When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Commissioners of Justice to do so.

28 U.S.C. § 518(b) (emphasis added). In this case, the United States' vital interest in upholding the constitutionality of a federal statute is at stake, therefore, the Attorney General has authority to attend to that interest and participate in this case. Consequently, 28 U.S.C. §§ 517 and 518

also provide the United States with an unconditional right to intervene that meets the requirement of Fed. R. Civ. P. 24(a)(1).

CONCLUSION

For the foregoing reasons, this Court should grant the Unopposed Motion by the United States to Intervene in this case for the purpose of defending the constitutionality of RLUIPA. The United States will be prepared to submit a memorandum in response to Defendant's Motion for Summary Judgment on or about March 24, 2003.

Dated: March 3, 2003

Respectfully submitted,

ROBERT D. McCALLUM, Jr.
Assistant Attorney General

JOHNNY K. SUTTON
United States Attorney
JOHN PANISZCZYN
Assistant United States Attorney
State Bar No.15443855
601 N. W. Loop 410, Suite 600
San Antonio, TX 78216

THEODORE C. HIRT
ADAM J. SZUBIN
Civil Division
United States Department of Justice
P.O. Box 883
20 Massachusetts Ave., N.W., Room 7124
Washington, D.C. 20044
Telephone: (202) 514-3486
Facsimile: (202) 616-8470

Attorneys for the United States